No. 83-972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
*Petitioner,*

v.

RICHARD B. OGILVIE, as Trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, BURLINGTON NORTHERN, INC., and the UNITED STATES OF AMERICA,
*Respondents.*

## REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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On December 12, 1983, the Railway Labor Executives' Association [hereinafter, "RLEA"] filed a petition with this Court requesting that this Court, pursuant to 28 U.S.C. § 1254(1), issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision and judgment entered by that appellate court in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 713 F.2d 274 (7th Cir. 1983). Respondents Richard B. Ogilvie, as trustee for the property of the Chicago, Milwaukee, St. Paul & Pacific Railroad [hereinafter, "MILW"], and the Burlington Northern, Inc. [hereinafter, "BN"] filed a brief in opposition to that petition. In their brief, the Trustee and the BN made several

argumentative factual statements that are inaccurate and to which petitioner believes a brief response should be made; consequently, petitioner RLEA respectfully submits this reply brief pursuant to Rule 22.5 of the Rules of this Court.

### I. Contrary To Respondents' Assertions, The Interstate Commerce Commission Did Not Find In This Case That The March 4 Hiring Agreement Adequately Protected All Railroad Employees Who Might Be Affected By The Sale Transactions

In their brief, the Trustee and the BN refer to the Interstate Commerce Commission's [hereinafter, "ICC" or "Commission"] decision in this case and allege that: "The ICC referred to the March 4 Agreement and found that 'the interest of Railway Labor will be adequately protected with regard to the BN and UP purchases.'" Respondents Br. at 7, *quoting*, *Burlington Northern, Inc.—Purchase*, 363 I.C.C. 298, 312 (1980). By that statement, Respondents obviously seek to leave the impression that the ICC agrees with their position that the March 4 Hiring Agreement satisfies the commands of Section 5(b)(1) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. § 904(b)(1), insofar as all potentially affected BN employees are concerned.[1] Such an impression, however, is inaccurate and misleading. A review of the ICC's decision in this case and its past decisions on this very issue show that the ICC recognizes that the March 4 Hiring Agreement does not by itself

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[1] Section 5(b)(1) of the MRRA provides that: "In authorizing any . . . sale or transfer, the court shall provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code."

satisfy the protective commands of Section 5(b)(1) of the MRRA.

In its decision which was issued on the BN's and Union Pacific Railroad's [hereinafter, "UP"] applications to purchase the MILW lines at issue, the ICC briefly addressed the employee protection question, and stated as follows:

> BN and UP are signatories to the Labor Protective Agreement Between the Railroads Involved in the Midwest Restructuring and Employees of Such Railroads Represented by the Railway Labor Executives' Association [*i.e.*, the March 4 Hiring Agreement]. *This agreement was entered into on March 4, 1980, pursuant to MRRA, and benefits former Milwaukee employees who are hired by signatory railroads.* MRRA, section 8, provides that former Milwaukee employees have the first right of hire by rail carriers subject to our jurisdiction. *MRRA also states that the court shall provide for employee protection at least as favorable as that required under 49 U.S.C. 11347.* We find that the interest of railway labor will be adequately protected with regard to the BN and UP purchases.

*Burlington Northern, Inc.—Purchase, supra*, 363 I.C.C. at 312 (emphasis added). As may be seen from the above quote, the ICC referred to the Hiring Agreement *and* to the levels of protection required by Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347[2] in stating that the interests of rail labor will be adequately protected.

Even if there were any ambiguity in the Commission's statement, which of course there is not, that ambiguity

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[2] According to the ICC, Section 11347 requires in purchase cases at least the imposition of those employee protections set forth in *New York Dock Ry.—Control.*, 360 I.C.C. 60, *aff'd, New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). *See, The Continental Group, Inc.—Purchase*, 363 I.C.C. 822, 839-40 (1980).

would be dispelled by a decision of the ICC which was issued approximately two months before the Commission's decision in the *BN Purchase* case. In that earlier decision (*St. Louis Southwestern Ry.—Purchase*, 363 I.C.C. 323 (1980)), the Commission addressed the relationship between the March 4 Hiring Agreement and the requirements of 49 U.S.C. § 11347. In that case, the purchasing carrier asked the ICC to give all of its affected employees the March 4 Hiring Agreement levels of protection; RLEA opposed that request asserting that employees not expressly covered by that Agreement must be given the *New York Dock* levels of protection. As the ICC stated in rejecting the purchasing carrier's arguments:

> It is obvious that labor negotiated the Hiring Agreement with various carriers in an attempt to provide as many of its members with jobs as possible. Few carriers seemed willing to purchase portions of RI [Rock Island] or Milwaukee in large part due to the expenses of labor protection. In order to give carriers an incentive to purchase RI and Milwaukee lines, and thus hire RI and Milwaukee employees, RLEA agreed to the Hiring Agreement level of protection for affected employees of the hiring carrier *in the same seniority districts*. It does not follow, as SP [*i.e.*, purchasing carrier] would have us believe, that all other affected SP employees should be limited to that protection.
>
> SP employees affected by this transaction who are not expressly covered by the Hiring Agreement must get the level of employee protection required by *New York Dock*.

363 I.C.C. at 380 (emphasis in original).

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[1] Respondents also make several other factual statements with which RLEA takes issue, but, except as noted below, those statements need not be specifically addressed in this reply brief because, RLEA submits, its petition adequately sets forth the correct facts in

## CONCLUSION

For the reasons set forth in the Petition, RLEA respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision and judgment of that Court in the case at bar.

Respectfully submitted,

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this case. The one factual statement of Respondents which deserves separate comment is Respondents' allegation at page 5 of their brief that: "The March 4 Agreement established the total employee protection responsibility for any carrier purchasing property from the Milwaukee." That interpretation of the Hiring Agreement is the issue in dispute between RLEA and BN and is the issue which RLEA submits the lower courts did not have the subject matter jurisdiction to resolve. Moreover, such an expansive view of that Agreement is contrary to the express terms of that Agreement which provides in Article 1, Section 2(a) that: "The provisions of this agreement shall constitute the complete labor protection obligation of a purchasing carrier *to the bankrupt carrier employees who are taken into its employ because of a transaction.*" Petition at 32a (emphasis added). Such a statement of intent is far different than the construction stated by Respondents in their brief.